Supreme Court, U.S.
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No. 96-388

In The

Supreme Court of the United States

October Term, 1996

HERMAN SKINNER,

Petitioner,

vs.

CITY OF MIAMI, FLORIDA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

As we noted, the City conceded both at trial and on appeal that if it was responsible for the fire fighters' conduct, that conduct amounted to a due process violation cognizable under 42 U.S.C. § 1983. The City confined its argument to its contention that the fire fighters had not acted under color of law, because they were not themselves policymakers, and because the City had no policy, custom or practice reflecting deliberate indifference to the plaintiff's rights. In light of overwhelming evidence to the contrary – some of it summarized by the dissent (12a) – both the jury and the district court rejected that contention; and the majority opinion of the court of appeals ignored the argument entirely, instead raising sua sponte the issue addressed in our petition – whether the fire fighters' conduct, if it did occur under color of law, rose to the level of a constitutional violation.

Given this scenario, it is curious at the least that the City in its response has chosen not to defend the court of appeals' rationale, but instead to resurrect the "color-of-law" framework which the jury rejected and the appellate court chose not to address. On every point which we made, the City's response is not a frontal rebuttal but a shift to the side; it argues not that the case which we cited is distinguishable in the quality of the rights asserted (which is the point for which we cited it), but solely because the cited case clearly involved governmental responsibility, while the instant case assertedly does not.

Thus the City says (response at 15-18) that *United States v. Lanier*[1] is distinguishable not because the conduct in *Lanier* more-clearly implicated constitutional rights, but rather because the offending judge in *Lanier* was "wearing his judicial robe" (response at 5), and thus "abused his position and power under color of law" (response at 17). And the City says (response at 9 & n.3) that *McWilliams v. Fairfax County Board of Supervisors*[2] creates no inter-circuit conflict, not because the County employees' sexual taunting and abuse in *McWilliams* more-clearly implicated constitutional rights, but only because *McWilliams* in turn relied upon an earlier case involving a "school official" – clearly a state actor. And the same assertedly is true of *MacDowell v. Massachusetts Fire Department*, 769 F. Supp. 40 (D.N.H. 1990), in which the offender was a "fire captain . . . acting under color of law" (response at 11 n.4). Likewise, all of the other cases which we cited by analogy are subject to the "critical distinction . . . that the wrong was committed by a state-actor" (response at 10). Thus the City's sole argument against certiorari is that the defendant "fire fighters are third-party, non-government actors" (response at 13-14). Its sole argument is a point which was not addressed by the court of appeals.

This is a risky strategy, because it concedes by its silence that the *holding* of this case – the point which the court of appeals *did* make – indeed conflicts with the

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[1] 73 F. 3d 1380 (6th Cir.), *cert. granted*, ___ U.S. ___, 116 S. Ct. 2522, 135 L. Ed. 2d 1047 (1996).

[2] 72 F. 3d 1191 (4th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 72, ___ L. Ed. 2d ___ (1996).

authorities which we cited. And that conflict itself warrants review by this Court. If and when this Court resolves the conflict, there will be time enough on remand for the court of appeals to address the "state-actor" issue, in light of the history of official indifference referenced in part by the dissenting opinion. For the moment, the sole question is whether the court of appeals' holding is worthy of review – and the City now has conceded that question.

The City also has conceded by omission our second point – that the court of appeals erred in excusing the City's explicit stipulation, of which the district court instructed the jury, that the plaintiff's constitutional rights were implicated. We acknowledged that an appellate court may excuse a waiver on an issue of law; but we demonstrated that the issue here is fact-specific (petition at 17-18). The City cites back to us the same cases stating the general principle (response at 18-19), but ignores the distinction. We also contended (petition at 18) that even if the issue were one of law, the criteria for recognizing fundamental error are not satisfied in this case, because the point of law is not indisputable. No response from the City. Thus, the court of appeals overstepped in its zeal to excuse the City's concession – even as it enforced a far-more casual "waiver" by the plaintiff, based upon some undisclosed comment at oral argument, of the plaintiff's longstanding Fourth Amendment claim.

CONCLUSION

It is respectfully submitted that a writ of certiorari should issue to review the court of appeals' decision.

Respectfully submitted,

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